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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

RICHARD D. RISLEY,

Petitioner,

v.

STATE OF MISSISSIPPI,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI

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OPINION BELOW

Opinion of the Supreme Court of the State of Mississippi is reported in 279 So.2d 154 (1973) and is appended hereto as appendix A. The opinion was rendered by the Supreme Court of the State of Mississippi on June 12, 1973, and the Petition for rehearing was denied June 29,1973.

JURISDICTION

The jurisdiction of this Honorable Court is invoked under Title 28 U.S.C., Section 1257(3), Petitioner having asserted below and asserting here the deprivation of rights secured by the Constitution of the United States.

THE CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States, Amendment XIV, Section 1.

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

QUESTION PRESENTED

Does a Defendant during an exclusionary hearing concerning eyewitness identification have a constitutional right to call witnesses in his behalf during such hearing, and is it a denial of due process under the XIV Amendment when the Defendant is not allowed to present witnesses during the exclusionary hearing?

STATEMENT OF THE CASE

The Petitioner, Richard D. Risley, was convicted on the 2nd day of November, 1972, in the Circuit Court of Jackson County, Mississippi, after trial by jury, on a charge of robbery and sentenced to twelve years imprisonment. An appeal was prosecuted to the Supreme Court of the State of Mississippi and is reported in 279 So.2d 154 (1973), being rendered on June 12, 1973, and the Petition for rehearing being denied June 29, 1973.

The primary evidence against the Petitioner during his trial was an eyewitness identification by the alleged

victim. When the State called the eyewitness and approached the point of asking the eyewitness for an identification of the Petitioner, Petitioner moved for an exclusionary hearing and for grounds cited the Fourteenth Amendment rights of the Petitioner among other grounds. Petitioner's motion for the exclusionary hearing was granted, the jury was removed from the court room, and the exclusionary hearing commenced. In somewhat unusual procedure, the court allowed the prosecution to propound questions to the eyewitness to show that the in-court identification was based solely on the eyewitnesses view of the Defendant at the time of the alleged crime; Petitioner was allowed extensive cross examination of the eyewitness to determine if her identification was constitutionally valid. However, the Court completely and totally denied petitioner his constitutional right to call witnesses in his own behalf during the exclusionary hearing to determine if the eyewitness identification in court was in any way tainted or otherwise constitutionally invalid. The Court then ruled that the eyewitness could give her identification testimony.

By assignment of error to the Supreme Court of the State of Mississippi, the Petitioner raised the question and error of the lower court in refusing the Petitioner his right to call witnesses during the exclusionary hearing. In requesting a Petition for a rehearing, Petitioners brief was exclusively directed to the question of whether or not the lower court erred in refusing Petitioner his constitutional right to call witnesses on his behalf during the exclusionary hearing.

SUMMARY OF THE ARGUMENT

The narrow question presented here is whether or not the Petitioner has a constitutional right during an

exclusionary hearing on eyewitness identification testimony to call witnesses in his own behalf. Petitioner submits that under the due process clause of the Fourteenth Amendment he has a constitutional right to call witnesses on his own behalf during such a hearing. The failure of the lower court to allow Petitioner these constitutional rights denied Petitioner due process of law, and Petitioner's conviction must be reversed and a new trial ordered.

ARGUMENT

Petitioner, during the trial of his case, moved the court for an exclusionary hearing on the eyewitness identification by the alleged victim. The motion was granted by the trial judge, and in a somewhat unusual procedure the trial judge allowed the prosecution to propound questions to the eyewitness to show that the in-court identification was based solely upon the witness's view of the Defendant at the time of the crime; the Court further allowed Petitioner extensive cross examination of the eyewitness to determine if the station house lineup and the preliminary hearing view of Petitioner affected the eyewitnesses in Court identification; but the trial court completely and totally denied petitioner the right to call witnesses in his own behalf during the exclusionary hearing.

The United States Supreme Court has long recognized the constitutional right of a defendant to an exclusionary hearing out of the presence of the jury. As stated in *Jackson v. Denno*, 378 U.S. 368, 12 L.Ed.2d 908, 84 S.Ct. 1774 (1964):

> Equally clear is the defendant's constitutional right at some stage in the proceedings to object to the use of the confession and to have a fair hearing and a

> reliable determination on the issue of voluntariness. . . .

In trials concerning eyewitness identifications, several cases set forth the procedure to be used, which is the same as that in *Jackson v. Denno*, supra. In *Clemons v. United States*, 408 F.2d 1230 (1968), the Court said:

> In the conduct of trials involving post-Wade and Gilbert identifications, the mode of proceeding would seem to be as follows: Whenever the prosecution proposes to make eyewitness identification a part of its case, the defense is entitled to know, through disclosure by the prosecution or *by evidentiary hearing outside the presence of the jury*, the circumstances of any pretrial identification. Where the prosecution intends to offer only an in-court identification, the defense may challenge its admissibility. The court should then, on facts elicited outside the presence of the jury, rule upon whether a pretrial identification by the same eyewitnesses is violative of due process or the right to counsel. If a violation is found, the court should then decide whether the in-court identification is still admissible because it has an independent source. . . . If the judge regards only the in-court identification as admissible, in the trial to the jury thereafter, the defense may, as a matter of trial tactics, decide to bring out the pretrial confrontation itself, hoping that it can thus detract from the weight the jury might otherwise accord the in-court identification. 408 F.2d at 1237 (emphasis added).

In *Solomon v. United States*, 408 F.2d 1306 (1969), the Court had the following to say on evidentiary hearings:

> The proper way to raise a Wade objection is by a motion to suppress identification testimony before

> trial. That procedure allows a suppression hearing and a decision on the disputed evidence before a jury is empaneled, and promotes an orderly and uninterrupted trial. A distinctly second-best procedure is a defense motion to suppress during trial. That procedure at least allows decision of the constitutional issue before fatally prejudicial testimony comes before the jury. 408 F.2d at 1309.

In *United States v. Allison*, 414 F.2d 407 (1969), the Court said:

> We agree that where a timely and sufficient motion is made to suppress identification testimony . . . it must be heard and determined by the court outside the jury's presence in the same manner as any other motion to suppress evidence alleged to be inadmissible because unlawfully obtained. 414 F.2d at 410.

Additionally, this court in *Gilbert v. California*, 388 U.S. 263, 18 L.Ed.2d 1178, 87 S.Ct. 1951, in a quotation found at 388 U.S. 272 said:

> The admission of the in-court identifications without first determining that they were not tainted by the illegal lineup but were of independent origin was constitutional error.

As stated in *Jackson v. Denno*, supra, and *Gilbert v. California*, supra, the Petitioner did have a constitutional right to an exclusionary hearing out of the presence of the jury and to determine whether or not the in-court identifications were tainted in any manner.

The procedure described above is clearly set forth in Mississippi Case law in *Henry v. State of Mississippi*, 174 So.2d 348 (1965), and this procedure was set forth after this United States Supreme Court reversed that case with directions at *Henry v. State of Mississippi*, 379 U.S. 443, 85 S.Ct. 564, 13 L.Ed.2d 408 (1965). At the direction of

this Court the Mississippi Supreme Court by case law set up the following procedure for exclusionary hearings:

> If, however, a motion is not made prior to the trial, asking the trial court to suppress the wrongfully obtained evidence, the person desiring to have the evidence stricken may nevertheless object to the introduction of the evidence upon the federal ground and then upon state ground, or either, during the trial and before the defendant has offered his evidence or defense. The court will then examine the federal and state claims raised by the objection so as to give a complete and effective airing of the objection, in the absence of the jury.

Petitioner promptly made his objections as set forth in *Henry v. State*, supra, *Jackson v. Denno*, supra, *Gilbert v. California*, supra, and all of the other cited cases setting forth the correct procedure for an exclusionary hearing. As stated earlier, in somewhat usual procedural fashion, the trial court let the state go forward with its evidence, allowed the Defendant wide latitude in its cross-examination, but completely and totally refused the Petitioner his constitutional right to call witnesses in his own behalf during the exclusionary hearing.

The dangers of pretrial identification were enumerated and discussed thoroughly in *United States v. Wade*, supra, and the Petitioner will not attempt to enumerate those dangers here; however, Petitioner does call to the Courts attention that part of its Wade decision, Part IV, dealing with the dangers. The Mississippi Supreme Court criticized Petitioner for not advising the trial court of any evidence that Petitioner had that would dilute the eyewitness identification of the Petitioner when the Petitioner attempted to call his witnesses during the exclusionary hearing. The problem is not as simple as it would be treated by the Mississippi Supreme Court. At

no time was the Petitioner allowed to probe into the pretrial identification without possible prejudicial material appearing before the jury, or bolstering the state witness's court room identification by bringing out and dwelling upon the prior identification. Only by an exclusionary hearing out of the presence of the jury can defense counsel properly inquire into pretrial identification. In *Clemons v. United States,* supra, as well as almost every other case heretofore cited by Petitioner, the court recognized the right to an evidentiary hearing such as that requested by the Petitioner. That court further recognized the fact that there are occasions when the defendant would not want to probe into the pretrial identification before the jury because it would harm the defendant, but that there would be other times when probing into pretrial identification would be beneficial to the Defendant. Impliedly, the defendant should not be required to probe into the dark before the jury, and possibly bolster the state's case, without an opportunity to first inquire into the suspect procedures out of the presence of the jury. The point Petitioner attempted to make before the Mississippi Supreme Court in his brief, oral argument and petition for a rehearing was that the Petitioner should not be required to probe into the dark with the witnesses before the jury, but that the jury should be excluded and the issue probed without the possibility of fatally prejudical testimony coming before the jury. After such a hearing defendant's attorney may decide to attempt to cast doubt upon the eyewitness identification by testimony gleaned from the hearing, or Defendant's attorney might decide that the evidence and eyewitness identification is so strong that he does not wish to examine further on that point. The defense attorney and defendant should have the right to inquire into pretrial identification out of the presence of the jury

before determining whether or not the issue will be probed during the trial before the jury. All of the cases cited above, except *Henry v. State of Mississippi,* discuss the many problems confronting a Defendant and his attorney as they probe into the constitutionality of various police practices such as how confessions were obtained, how lineups were conducted and how evidence was seized. Those same cases all recognize the procedure to be followed during exclusionary hearings, and such procedure is exactly that requested by the Petitioner in the trial court and the Mississippi Supreme Court. To have an exclusionary hearing without allowing the defendant to call witnesses in his own behalf obliterates that fundamental right of the accused to present witnesses in his own defense as recently discussed by this Court in *Chambers v. Mississippi,* ___ U.S. ___, ___ S.Ct. ___, 35 L.Ed.2d 297 (1973), "Few rights are more fundamental than of an accused to present witnesses in his own defense. E.g., *Webb v. Texas,* 409 U.S. ___, 34 L.Ed.2d 330, 93 S.Ct. 351 (1972); *Washington v. Texas,* 388 U.S. 14, 19, 18 L.Ed.2d 1019, 87 S.Ct. 1920 (1967); *In re Oliver,* supra," 35 L.Ed.2d 297, 312. The cited decisions uniformly set forth the procedure to be used by courts during an exclusionary hearing involving constitutional principals. *Henry v. State of Mississippi,* supra, can leave no doubt as to the procedure to be followed in the state of Mississippi and that Petitioner properly followed Mississippi procedure.

The Petitioner respectfully request the Supreme Court of the United States to vacate the judgments below and remand the case for a new trial consistent with the aforementioned cases. Such a request is in line with earlier actions of this court, wherein the court after the decision in *Jackson v. Denno,* supra, vacated such State and Federal judgments and remanded the cases for

further proceedings not inconsistent with the opinion in *Jackson v. Denno*, supra. Petitioner especially points out the case of *State v. Owens* (1963), 94 Ariz. 404, 385 P.2d 700, vacated 378 U.S. 554, 12 L.Ed.2d 1041, 84 S.Ct. 1932, when the trial court refused to allow a hearing in the absence of the jury in a rape prosecution concerning the voluntariness of "Exculpatory Statement" by the accused, and the jury subsequently returned a verdict of guilty. Petitioner earnestly submits that the decisions and judgments of the lower courts should be vacated, and a new trial ordered for the Petitioner. It would be insufficient to remand Petitioner's case to the lower court for a hearing to determine the constitutionality of the various lineups and identifications, because such action would still deny Petitioner his right to use any weaknesses of the eyewitness identification in his defense if they or otherwise constitutionally valid. The record and decision of the Mississippi Supreme Court indicates that once the trial judge refused to allow the Petitioner to call witnesses during the exclusionary hearing, the Petitioner should have delved into the eyewitness identification in the presence of the jury. Petitioner could not ask questions in the presence of the jury, because at that time Petitioner had no way of knowing whether he would be helping his case or bolstering the states case. Only a new trial, wherein an evidentiary hearing is held as set out by the cited cases, can adequately provide Petitioner with a fair and impartial trial.

CONCLUSION

WHEREFORE, for the foregoing reasons, Petitioner respectfully urges that the writ of certiorari be granted.

Respectfully submitted,

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APPENDIX A

IN THE SUPREME COURT OF MISSISSIPPI

No. 47,402

RICHARD D. RISLEY

v.

STATE OF MISSISSIPPI

RODGERS, PRESIDING JUSTICE.

The appellant Richard D. Risley and Roger J. Risley were jointly indicted in the Circuit Court of Jackson County, Mississippi for the alleged robbery of Mrs. Dianna Davis. Roger Risley was acquitted, but the jury found the appellant, Richard D. Risley, guilty. He was sentenced to serve a term of twelve (12) years in the state penitentiary. After his motion for a new trial was overruled, he has appealed to this Court and now contends that the trial court erroneously denied the appellant the right to call witnesses during the preliminary hearing on appellant's motion, offered in the absence of the jury, on the issue as to whether or not the eyewitness identification was tainted by suggestive procedures to such an extent that its introduction would deny the defendant due process.

Appellant also complains that the trial court erred in permitting an officer to testify that Roger Risley said his brother ran out of the house and said: " 'Get the hell out of here.' What would you do if this remark was addressed to you?"

The appellant argues that he was entitled to call witnesses to show that the eyewitness identification testimony should not be admitted because it was wrong-

fully obtained. He cites *United States v. Allison*, 414 F.2d 407 (9th Cir. 1969), a California case, with reference to pre-trial photographic identification, in such a manner so as to taint in-court identification. The *Allison* case cites *Simmons v. United States*, 390 U.S. 377, 88 S.Ct. 967, 19 L.Ed.2d 1247 (1968), in which the United States Supreme Court laid down the rule that each pre-trial hearing on a motion to exclude must be considered on its own facts, and if within the light of the totality of the circumstances surrounding the case, the identification procedure by use of photographs is not such as to deny due process of law, the testimony is admissible. In *Foster v. California*, 394 U.S. 440, 89 S.Ct. 1127, 22 L.Ed.2d 402 (1969), the United States Supreme Court gave an example of prejudicial identification. In that case the suspect was a tall man, and he was lined up with short men for identification purposes. When the eyewitness could not identify him, they brought the defendant into a room so that the witness could speak to him. Still, the witness was not sure. Ten days later the prisoner was again exhibited in a lineup, and this time the witness was convinced that the prisoner was the robber. The Court held that the continued effort to get the witness to identify the prisoner "as the man" was sufficient to undermine the reliability of the identification so as to violate due process.

In the instant case, the appellant did not advise the court of any evidence that he had that would dilute the eyewitness identification of the prisoner. The witness whom he wanted to call was later introduced and cross-examined by the appellant, but no evidence was adduced by any witness during the trial to dilute the identification of the defendant made by the victim.

The appellant contends that the statement made by Roger Risley with reference to what his brother said at

the time he made a telephone call was made as a result of questions propounded to him by the officers after he had told them that he desired to remain silent. If this evidence were inadmissible for other reasons, they were not made known in the trial court. The testimony was not objectionable for the reason given because the record shows that the statement was made voluntarily at a time when the witness was not being interrogated.

We think that the testimony was sufficient to establish the appellant's guilt, and since there is no reversible error in the record, the judgment of the trial court must be affirmed.

AFFIRMED.

PATTERSON, INZER, ROBERTSON and WALKER, JJ., CONCUR.